No. 389

In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, PETITIONER

v.

ANHEUSER-BUSCH, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER

Since filing our petition in the above-captioned case, we have learned of the recent decision of the Court of Appeals for the Tenth Circuit in *Atlas Building Products Company* v. *Diamond Block & Gravel Company*, dated August 17, 1959. That case, like this one, arises under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, and involves a charge that a multi-state seller has engaged in territorial price discrimination. The case differs in the respect—immaterial for present purposes—that it is a suit for damages by a competing seller, rather than a Federal Trade Commission proceeding looking to issuance of a cease-and-desist order. The issue raised by the Tenth Circuit case, however,

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is in substance the same as the issue stated in the Government's petition: Whether price-cutting in a particular locality by a nationwide seller who maintains higher prices in other localities, with consequent injury to competition in the locality in which the lower price is charged, constitutes a discrimination in price forbidden by Section 2(a) of the amended Clayton Act.

The Tenth Circuit has decided this issue in a manner which is directly contrary to the holding in the instant case. The conflict, indeed, is an express one. Thus, the Tenth Circuit's opinion declares in pertinent part (Appendix, pp. 9–10):

> The same legal issue was before the Seventh Circuit in *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 265 F. 2d 677, where the court was presented with the basic question whether uniform local price cuts by an interstate manufacturer which disrupted the market to the injury of local competitors, were price discriminations within the proscription of Section 2(a). The court held that even though directed at local competitors, the price cuts were not discriminatory, apparently because they did not discriminate among local competitors. This conclusion is apparently based upon the theory contended for here that the statutory words "different purchasers" means competing purchasers. We respectfully reject any such restriction upon Section 2(a). For, we are convinced that geographic price discriminations employed for predatory ends are cognizable under either Section 2(a) or Section 3, and it was therefore not error for the court to tell the jury that they might consider differences in

price in El Paso County, Texas, and Dona Ana County, New Mexico, in determining whether the defendant was guilty of actionable price discrimination.

For the convenience of the Court, the full opinion is set forth in the Appendix which follows.

Respectfully submitted.

J. Lee Rankin,
Solicitor General.

September 1959.

APPENDIX

United States Court of Appeals
Tenth Circuit

No. 5990—May Term, 1959

THE ATLAS BUILDING PRODUCTS COMPANY, APPELLANT

v.

DIAMOND BLOCK & GRAVEL COMPANY, APPELLEE

(August 17, 1959)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

John P. Eastham and J. F. Hulse (of the firms of Scott, Hulse, Marshall & Feuille; and Rodey, Dickason, Sloan, Akin & Robb) for Appellant.

Dee C. Blythe and James T. Martin, Jr. for Appellees.

Before MURRAH, PICKETT and BREITENSTEIN, *Circuit Judges*; MURRAH, *Circuit Judge*.

This is an appeal from a judgment for triple damages in a private antitrust suit, laid under Section 2(a)[1] of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1536, 15 U.S.C.A. 13(a).

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of

The allegations are that the plaintiff-appellee, Diamond Block & Gravel Company, is a manufacturer and seller of cinder concrete building blocks to the building trade in Las Cruces, New Mexico and vicinity; that the defendant-appellant, Atlas Building Products Company, manufactures and sells the same products in El Paso, Texas and vicinity, where it has a virtual monopoly; and that it also sells those products to the building trade in Las Cruces and vicinity. The crux of the charge is that commencing in 1950, and continuing to the filing of this suit, the defendant has systematically sold its products in Las Cruces at prices actually lower than its comparable El Paso sales; that it employed its highest El Paso prices to finance its price war against competitors in New Mexico, including the plaintiff; that such practices constitute price discriminations between different purchasers, the effect of which may be to lessen competition or tend to create a monopoly in commerce in building blocks, or to injure, destroy or prevent competition by the plaintiff with the defendant, and with persons who received the benefit of such discriminations, or with customers of either of them. The appellee then alleged that as a result of the acts complained of, it has been injured in its business in the sum of $200,000.00, for which it prayed judgment, to be tripled as required by law, and for reasonable attorney fees.

The appellant moved to dismiss the complaint for failure to state a claim upon which relief could be

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such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them * * *."

granted under Section 2(a), and upon denial pleaded, first, that its pricing policies were not discriminatory, but if so, they were made in good faith to meet an equally low price of a competitor within the meaning of Section 2(b), 15 U.S.C.A. 13(b).[2] The case was submitted to the jury on the theory that the burden was upon the plaintiff to show by a preponderance of the evidence that the defendant did in the course of commerce, directly or indirectly, discriminate in price between different purchasers of concrete cinder building blocks of like grade and quality; that price discrimination in the statutory sense means the giving to one of the purchasers an advantage in price not accorded or given to other purchasers. The jury was specifically told that a price discrimination as thus defined was not alone sufficient to sustain a claim under Section 2(a), for to be actionable, the evidence must show a "reasonable possibility" of a substantial lessening of competition or tendency to create a monopoly, or injure, destroy or prevent competition with any person who grants or receives the benefit of such discrimination. Thus, the jury was instructed that "a price discrimination may exist if a seller exacts different prices from its customers * * * where one leg of the price differential is across state lines and this differential affects or has a tendency to affect competition in the ways I have mentioned"; and that "the jury has the right to consider any difference in prices charged in El Paso, Texas on the one hand, and prices exacted by it [the defendant] in

[2] Section 2(b) pertinently provides:

"That nothing contained in sections 12, 13, 14–21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Dona Ana County, New Mexico [Las Cruces] on the other."

The defendant objected to all of these instructions and to refusal of the court to instruct the jury that to be actionable under Section 2(a), the price discrimination must be between different purchasers in direct competition with each other; and that the court therefore erroneously permitted the jury to consider the difference in the defendant's prices in El Paso on the one hand, and Las Cruces on the other.

Thus, we have squarely presented the question whether the prohibitions of Section 2(a) are applicable to price discriminations between different, but noncompeting, purchasers of products of like grade and quality. The appellant takes the position that geographic price differentials or discriminations between noncompeting purchasers in different localities are not actionable under Section 2(a), but only under Section 3 of the Robinson-Patman Act, for which a private cause of action under Section 4 admittedly does not lie. And see *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373; and *Safeway Stores, Inc.* v. *Vance*, 355 U.S. 389.

In the first place, there is nothing in the statute to indicate that its prohibitions are restricted to price discriminations between competing purchasers in the same area. The statute is not couched in terms of locality. See *Corn Products Co.* v. *Federal Trade Commission*, 324 U.S. 726, 734. The purpose of this Section as an integral part of the antitrust legislative scheme is to prevent price discriminations in commerce which tend to injure competitive enterprise. To that end, it forbids a seller from charging different customers different prices for the same products with the effect of lessening competition. And, we know that market power is a ready means toward

competitive injury. See Sen. Rep. 1502, 74th Cong., 2 Sess., 4 (1936); H. R. Rep. 2287, 74h Cong., 2 Sess., 8 (1936); 80 Cong. Rec. 9417 (1936). Furthermore, geographic price discrimination between noncompeting purchasers was asserted and sustained under both Sections 2(a) and 3 in *Moore* v. *Mead's Fine Bread*, 348 U.S. 115. Indeed, the court pointed out that such practices were prohibited under the Clayton Act even before the Robinson-Patman Amendment, citing *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 237. The court was sure that "Congress by the Clayton Act and the Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent." It went on to quote from a statement of Congressman Utterback, one of the Managers of the Robinson-Patman Amendment, that "Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other * * *." And see also *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 716.

It is agreed that Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act "overlap in some respects", but are in no way inconsistent with each other. Section 2(a) provides a civil remedy by way of triple damages, while Section 3 imposes criminal penalties for some but not all of the same infractions. * * * (Section 3 is specific in its interdictions of geographic price discriminations, while Section 2(a) is broader to prohibit the same practices between different purchasers wherever located, whether competing or not, when the effect of such discrimination may substantially lessen competition or tend to create a monopoly in any line of commerce.) Antitrust legislation is concerned primarily

with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor.

Our case is clearly distinguishable from suits by a local purchaser against a manufacturer, where competition between purchasers is of course essential to actionable price discrimination. See *Naifeh* v. *Ronson Art Metal Works*, 117 F. Supp. 690, affmd. 218 F. 2d 202; *Klein* v. *Lionel Corp.*, 237 F. 2d 13; *Shaw's, Inc.* v. *Wilson-Jones Co.*, 105 F. 2d 331. Our case is also, we think, distinguishable on facts from *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, in which, while the interstate manufacturer discriminated in price between different purchasers in distant localities, the difference in the price was held not to substantially lessen competition or tend to create a monopoly in the product sold. In short, the conclusive finding of the trial court negated the existence of any prohibited consequences or the possibility thereof.

The same legal issue was before the Seventh Circuit in *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 265 F. 2d 677, where the court was presented with the basic question whether uniform local price cuts by an interstate manufacturer which disrupted the market to the injury of local competitors, were price discriminations within the proscription of Section 2(a). The court held that even though directed at local competitors, the price cuts were not discriminatory, apparently because they did not discriminate among local competitors. This conclusion is appar-

ently based upon the theory contended for here that the statutory words "different purchasers" means competing purchasers. We respectfully reject any such restriction upon Section 2(a). For, we are convinced that geographic price discriminations employed for predatory ends are cognizable under either Section 2(a) or Section 3, and it was therefore not error for the court to tell the jury that they might consider differences in price in El Paso County, Texas, and Dona Ana County, New Mexico, in determining whether the defendant was guilty of actionable price discrimination.

As thus construed and applied, the appellant says that the statute is so vague and indefinite as to be incapable of observance in circumspect human conduct, and is therefore fatally defective for want of due process. But we do not think the generalized language of Section 2(a) is any less definite and certain in the standards of conduct it proscribes than the restraint of trade and monopolization provisions of Sections 1 and 2 of the Sherman Act, the criminal sanctions of which have long since been sustained as against the claim of unconstitutional vagueness. See *Nash* v. *United States,* 229 U.S. 373. "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Id. p. 377. Other related provisions of the antitrust laws of equally vague import have withstood the constitutional test. See *F. & A. Ice Cream Co.* v. *Arden Farms,* 98 F. Supp. 80; *Elizabeth Arden, Inc.* v. *Federal Trade Commission,* 156 F. 2d 132.

This brings us to the sufficiency of the facts to sustain the charge, and we think they are adequate.

It seems to be agreed that the appellant's prevailing El Paso prices to dealers and contractors during the period in question were 24¢ per standard block,

less 10 per cent, plus $1\frac{1}{2}$¢ delivery charge, or a delivered price of 23.1¢. And, there was evidence from which the jury was justified in finding that during the same period, the appellant's Las Cruces delivered price was 20¢, including a 3¢ haulage charge. There were variations in the prices to dealers and contractors, but the 20¢ delivered price was generally applicable to the principal building contractors. There was evidence to the effect that from the early part of 1952, when the appellee commenced business, it sold cinder blocks of the same grade and quality to the building trade for 23¢ per block, less 10 per cent, plus $1\frac{1}{2}$¢ haulage, or a net of 22.2¢ delivered price; that in some instances it gave a 12 per cent discount to large contractors, or a net of 21.74¢; that in May 1953, the price was changed to 24¢, less 10 per cent, plus $1\frac{1}{2}$¢ haulage, or a net of 23.1¢ delivered price. There was testimony to the effect that in April or May 1952, the contractors who had been purchasing blocks from appellee at the foregoing prices inquired whether it could meet a 20¢ delivered price; that thereafter appellee did sell block for two or three houses to one principal builder for 20¢ delivered price, but was forced to discontinue sales at this price; that this builder and other builders thereupon ceased to purchase blocks from appellee and thereafter purchased all of their blocks from the appellant.

The appellant points to the fact that it sold much of its blocks through its dealers in Las Cruces and vicinity, and that those dealers sold blocks retail always in excess of 24¢, and sometimes as much as 27¢; that the appellee was actually in competition with appellant's dealers, between which there was no price discrimination; that the appellee was unable to compete for the contractors' trade because of its inability to supply their requirements due to lack of plant

facilities and raw materials, production problems, failure to make special types of blocks needed in the building industry, wasteful increase in production costs, lack of sales organization, failure to maintain sufficient inventory, and other economic factors disabling the appellee from supplying the market demand in its trade area.

There was evidence that during the prosecution period, the appellant sold $162,000.00 worth of blocks in the Las Cruces area for prices in excess of 24.1¢, but the evidence also showed without much dispute that during the same period, it sold $603,163.00 worth of blocks at prices lower than 24.1¢ in the same area. From this it is reasonable to say, as did the jury, that the appellant discriminated in prices between its purchasers in El Paso and its purchasers of the same class in the Las Cruces area.

As we have seen, the jury was emphatically told that only price discriminations resulting in proscribed harmful effects were actionable. But the jury was also told, rightly we think, that in determining the presence or absence of the harmful effects, if any, it could consider the size of the appellant and its economic power in the area in which it operates, the amount of blocks sold by appellant as compared to the amount sold by appellee, and the comparative prices at the consumer level, that is, the level of contractor and retail sales; and that they should take into consideration the reasons given by purchasers for purchasing appellant's or appellee's blocks. In that connection, however, the jury was advised that the antitrust laws were never intended as an "instrument to stifle or prevent competition, or as a means to create monopolies." That, "While its primary purpose was to give some measure of protection to the small business, as against unlawful practices by strong and powerful

competitors, it does not exclude or preclude the large business from entering into any field and competing legitimately with others engaged in a like business enterprise." Thus, the jury was told that if the appellee failed to prove by a preponderance of the evidence that the price discriminations, if any, had reasonably possible harmful effects as outlined in the statute, the verdict must be for the appellant.

There was testimony that the appellant's 20¢ delivered price to the principal contractors deprived the appellee of its "bread-and-butter" business and prevented it from enlarging its plant facilities to take care of the demand, or to pursue a vigorous sales policy. There was evidence that in a healthy market the appellee could have enlarged its plant within a short time to enable it to compete for the business of the principal contractors in this particular area.

It is significant, we think, that the appellant was the largest manufacturer and supplier of cinder concrete blocks in this territory. It enjoyed a virtual monopoly in El Paso County, and possessed the dominant market power in nearby counties in New Mexico, including Dona Ana County. In this setting, it is fairly inferable that the appellant utilized its higher El Paso prices to stifle competition with its lower prices in the Las Cruces area. In other words, that the appellant utilized its dominant market power for predatory ends. It was not error, therefore, for the trial court to instruct the jury that in determining the tendency of the price discriminations to substantially lessen competition and create a monopoly, they could consider the size of the appellant, its economic power and its comparative prices to purchasers in the El Paso and Las Cruces areas. Cf. *Moore* v. *Mead's Fine Bread*, supra; *United States* v. *Griffith*, 334 U.S. 100.

In defense of its pricing policy, appellant refers to a sale of pumice blocks by a competitor, not the appellee, for 20¢ delivered price, and indicates that its 20¢ delivered price was made to meet an equally low price of a competitor. But the evidence shows that the 20¢ delivered price was an isolated sale and arose through a misunderstanding between the purchaser and the supplier. In any event, the jury was told that even though they believed by a preponderance of the evidence that the appellant did discriminate in price, if they were satisfied by the same preponderance of the evidence that such discrimination was in good faith and only to meet an equally low price of a competitor, their verdict should be for the appellant, so long as the price reduction was not below the competitor's low price. And see *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231. We think these instructions, considered together, correctly state the antitrust law applicable to these facts.

As we have seen, the jury was positively instructed that appellant's price discriminations, if any, were actionable if there was a "reasonable possibility" of a substantial lessening in competition or tendency to create a monopoly. The appellant objected to the use of the words "reasonable possibility", insisting that the court should have required a showing of a "reasonable probability" of the proscribed effect on commerce.

The use of both phrases to mean the same thing in *Corn Products Co.* v. *Federal Trade Commission*, supra, has provoked considerable discussion concerning the authoritative choice of the two to define the statutory phrase "may be to substantially lessen competition * * *" which, in our judgment, needs no definition. *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37; *E. Edelmann & Co.* v. *Federal Trade*

Commission, 339 F. 2d 152; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253; *Moog Industries* v. *Federal Trade Commission*, 238 F. 2d 43. But whatever may be said for the use of the words "reasonable probability" as a basis for judicial action (see Mr. Justice Jackson dissenting in *Federal Trade Commission* v. *Morton Salt Co.*, supra), the fact remains that for good or bad, the Supreme Court has deliberately adopted "reasonable possibility" over the more positive "reasonable probability" to indicate the required quantum of proof to show the prohibited harm. *Federal Trade Commission* v. *Morton Salt Co.*, supra.

While the court did tell the jury that reasonable possibility of harmful results was sufficient, it did emphasize that such harm must not be "imaginary or illusive". We cannot say that the trial court erroneously used the phrase "reasonably possibility" instead of "reasonable probability".

The appellant also complains of the refusal of the trial court to give its requested instructions on proximate cause. But the jury was told clearly and unmistakably that even though it should find that the appellant's pricing policies amounted to actionable price discrimination, the burden was on the appellee to establish by a preponderance of the evidence that the losses, if any, were proximately caused by such price discriminations; that loss of business occasioned by inability to achieve or maintain an adequate inventory, inability to deliver its products to purchasers, by shut downs in its plant, failure of material and supplies, or failure to bid on business or solicit purchases, could not be attributable to the appellant's pricing policies; and if, therefore, the jury found that the loss of business was caused by any of these factors or by legitimate competition, their verdict

should be for the defendant. The jury was instructed in language too clear for doubt that there must be a causal connection between the losses sustained, if any, and the unlawful acts of the appellant. Under these instructions we think the question of proximate cause was properly submitted to the jury. And see *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555.

The ascertainment of requisite damages to the appellee's business and property was submitted to the jury on the theory that it was incumbent on the appellee to prove such damages with reasonable certainty, not by guess and conjecture. But, "If the damage is certain, the fact that its extent is uncertain does not prevent a recovery." *Story Parchment Co.* v. *Paterson Co.*, supra. See also *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F 2d. 416; *Leader Clothing Co.* v. *Fidelity & Casualty Co. of N.Y.*, 237 F. 2d 7; *Wells Truckways* v. *Burch*, 247 F. 2d 194; *Bigelow* v. *R.K.O. Radio Pictures*, 327 U.S. 251.

On the question of damages and the amount thereof, the appellee relied on the testimony of one of its partners, who produced the records of the Company on sales and cost of production, and who also testified concerning the appellee's sales policies in the Las Cruces area in its attempts to compete with the appellant. Generally, the testimony reflected an increased cost of production commensurate with decreased production resulting from diminished sales. A public accountant analyzed the appellee's production cost and computed the amount of business the appellee might reasonably be expected to receive if El Paso prices (i.e. 21.6¢ f.o.b.) had prevailed, and from that projected the appellee's profits but for the price discrimination. A manufacturer's agent, familiar with the block building business, and particularly the production methods and procedures prevalent in the

business, testified that the appellee could have expeditiously enlarged its production facilities to meet the demand and compete for its fair share of the business in a flourishing market. The accounting procedures employed by the appellee to show damages were not as satisfactory as the trial court thought they should have been, but that they were sufficient. We agree that the evidence tended to show that as a result of the appellant's pricing policies, the appellee had been deprived of business which it would have reasonably been expected to obtain under prices generally prevailing in the El Paso area; and that as a result of the loss of this business, its profits dwindled, its cost of production increased, and the value of its business was diminished.

In that regard the jury was instructed that in determining damages it might consider as one of the elements, any profits that may have been lost by appellee in its business; and that it might also consider as another element of damages the extent to which the value of appellee's profit or the net worth of its assets had been diminished as a result of the price discrimination. The appellant objected to this instruction on the ground that it permitted the jury to assess double damages for one wrongful act.

The statute speaks of injury to "business or property". And see Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A. 15.[3] And, those words in their ordinary sense have been construed in terms of (1) the difference, if any, between the amounts actually realized by the injured party and what it would have reasonably expected to realize from sales but for the unlawful acts complained of; and (2) the extent to

[3] Section 4 provides in material part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * *."

which the value of the petitioner's property had been diminished as a result of such acts. See *Story Parchment Co.* v. *Paterson*, supra; *Kobe, Inc.* v. *Dempsey Pump Co.*, supra; *Bigelow* v. *R.K.O. Pictures*, supra. We think both loss of profits in business and diminishment of the assets were proper elements of damage, and the trial court did not err in so submitting the case to the jury.

The appellant also challenges the testimony of the accountant and the manufacturing agent as wholly outside the scope of the case and the knowledge of the witnesses, and as based upon hypothetical facts having no basis in the evidence and contrary thereto. Much of the accountant's testimony was of doubtful relevance, and the court excluded parts and confined other parts within narrow range. We think in the last analysis the weight and probative value of the testimony they gave concerning the amount of damages was for the jury under instructions of the court.

As the trial court observed, the jury award of $10,000.00 was "very moderate" under the proof of the amount of sales and the worth of the business involved. We have recently restated the general rule that "on a motion for directed verdict upon the ground of the insufficiency of the evidence to take the case to the jury on the crucial issue or issues of fact, the evidence and the inferences fairly to be drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed. And if the evidence and the inferences fairly drawn therefrom—viewed in that manner—are such that reasonable minded persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue or issues of fact, the motion should be denied and the question submitted to the jury." *Transcontinental Bus Sys-*

tem, Inc. v. *Taylor,* 265 F. 2d 913. See also *Linn* v. *Ute Uranium, Inc.,* 265 F. 2d 916; *Story Parchment Co.* v. *Paterson, supra.* We agree with the trial court that the evidence, considered in its entirety, is sufficient to support the judgment of the court, and it is affirmed.

U S GOVERNMENT PRINTING OFFICE 1959

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Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Questions Presented

Petitioner's statement of the questions presented is incorrect and misleading in the light of the proposition presented by the Commission to the Seventh Circuit and the undisputed facts of this case.

In the light of the decision of the Seventh Circuit, the principal question is:

Whether the temporary lowering of prices by a seller uniformly in one marketing area while maintaining higher

prices in other marketing areas is a discrimination in price under Section 2(a) of the amended Clayton Act, where:

(1) There were characteristically different prices prevailing in different markets at all times in the industry; and

(2) There was no complaint by the Commission concerning the maintenance of those different prices.

(3) There were no sales below cost;

(4) There was no purpose to destroy or eliminate a competitor or any other predatory purpose;

The decision of the Commission and the proposition it presented to the Seventh Circuit was that a lowering of price in one marketing area without lowering prices in other marketing areas, is a discrimination in price in and of itself, without more, under Section 2(a). As stated by the Commission in its brief to the Seventh Circuit:

> "Petitioner has regularly sold its beer at different prices in different markets of the country. These different market prices were not the subject of the Commission's complaint and are not in issue here. We are concerned with the lowering of the prices in one area while maintaining prices in all other areas, albeit the maintained prices might be different prices." (See Pet. p. 18)

Petitioner's statement of the question is incorrect because it confuses the relationship existing in Section 2(a) between a "discrimination in price" and the effect which such discrimination must have before a prima facie case of violation can be demonstrated. The Court below decided on these facts that there was no discrimination in

price. It expressly indicated that under the circumstances it was unnecessary for it to consider the contested issue of whether there was consequent injury to competition. While the petitioner recognizes that the injury question was not decided by the Court (Pet. p. 6) nonetheless it confuses the issue by in effect failing to recognize that Section 2(a) requires proof of two separate facts: first, that a company has "discriminated in price between different purchasers", and second, that "the effect of such discrimination" may be as described therein.

Related questions which were argued to the Court of Appeals, but which the Court found it unnecessary to determine, are:

(1) Whether respondent's temporary price reductions in the St. Louis market injured competition within the meaning of the statute merely because respondent temporarily obtained additional sales where three firmly entrenched competitors had more than 80% of sales and when competition remained keen both during and after the price reductions.

(2) Whether respondent was meeting an equally low price of a competitor in good faith within the meaning of the absolute defense of Section 2(b) of the amended Clayton Act when respondent, while seeking means to offset its general loss of sales, temporarily reduced its prices in the St. Louis market to prices which were always higher than or equal to those of its "firmly entrenched" competitors.

(3) Whether an order requiring reductions in all markets if a seller reduces a price in one market may be permitted to stand if it has no basis in fact or in statutory purpose.

Statutes Involved

In addition to the statute cited by petitioner, reference is also made to Section 2(b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(b), which provides in pertinent part:

> "* * * Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *."

In addition, Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> "Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

Statement of the Case

Petitioner's statement of the case is inadequate to give the Court a proper view of the issues in this matter. Respondent desires to make its own statement of the case:

The gravamen of the Federal Trade Commission complaint issued in 1955 was that respondent sold its Budweiser beer on a nationwide basis and reduced its prices in January and June 1954 in St. Louis and St. Louis County, Missouri, with the result that after the second price reduction Budweiser exactly matched the established price charged for beer by its St. Louis competitors and that it did not simultaneously lower its prices elsewhere (App. 5-7).*

At all times involved—before, during and after the alleged price reductions in St. Louis—all retailers in St. Louis at any particular time bought Budweiser at the same price. The requisite statutory injury to competition was alleged to have occurred among respondent's St. Louis competitors (App. 8) who were continuing to sell to the same retailers to whom they had always sold at the same price at which they had previously sold.

The Commission's opinion recognizes that to require respondent to maintain uniform prices in different markets "would be contrary to market realities." (App. 60)

Pricing in the beer industry has been characterized by different prices in different markets reflecting varying transportation costs, local taxes and local competitive conditions, such as the freight advantages of competing brew-

*App. refers to the single appendix in lieu of separate appendices filed in the Court of Appeals.

ers, the general economic status of the local population, shifts in buying power due to local developments (e.g., a strike in a steel town, a recession in a local industry), advertising expenditures by competitors, and the varying markups of various wholesalers and retailers.

The Commission conceded that "All of the above distributive characteristics directly affect price and competition in any given market * * *. All of them are beyond the control of the brewers, yet the price to the consumer is controlled by them." (App. 19, 48)

Nonetheless, the Commission's order broadly restrains respondent from reducing prices in any market unless it "proportionally" reduces prices everywhere for the same quantity of beer.

Respondent had three principal competitors in the St. Louis market: (1) Falstaff Brewing Corporation, which operated eight breweries, distributed its beer widely in 26 states in the Midwest, South, Southeast and West Coast areas, and which in 1954 ranked sixth in sales and in 1955 (after the price reductions complained of) ranked fourth in sales in the United States (App. 25, 1493-96); (2) Griesedieck Bros. Brewing Co., which marketed its beer in 13 Midwestern states (App. 25); and (3) Griesedieck Western Brewing Company, which operated two breweries, marketed its beer in 20 states and which was purchased in 1954 by Carling Brewing Company, Inc., a subsidiary of Canadian Brewers, Ltd., which owns 20 breweries throughout the United States and Canada (App. 25, 33). Thus, the competitors were substantial companies, "firmly entrenched" over a wide area, not "relatively small local rivals" as implied by the petitioner (Pet. p. 7).

Over the years respondent has been one of the few brewers selling throughout the United States from one or

two brewing locations, despite the freight, tax and other disadvantages (App. 17-19, 1393). While respondent has ranked first or second in total sales, it has never had more than about 7% of national beer sales and in no major market in the United States is it first in sales, and in most of them it is not second or third (App. 82-83). On the other hand, respondent's major regional competitors have far out-stripped it in sales in each market and their sales growth in recent years has been substantially greater than respondent's (App. 1383, 1494-96). Some regional brewers like Falstaff have purchased plants in different areas of the country (App. 215-17, 930, 1171, 1174, 1179-80, 1181, 1185), thereby increasing their freight and other advantages over respondent. Furthermore, respondent is unable to compete effectively in advertising expenditures with the regional brewers in particular markets, for when a brewer competes in every market and has a minor portion of the sales in each of these markets, it necessarily "scatters its shots" in so far as advertising in that market is concerned (App. 153, 156). Thus, in 1953, Griesedieck Western had 38.9% of the St. Louis market, Falstaff 29.4%, Griesedieck Bros. 14.4%, the respondent 12.5%, and the balance of approximately 5% was shared by a large number of other brewers selling in that market (App. 26).

In the Fall of 1953, after an increase in costs due to a new and higher wage contract, respondent increased its price of Budweiser 15 cents a case in all markets, except those in Missouri and Wisconsin (App. 929, 997). This small brewery increase was multiplied by the wholesalers' and retailers' markups in many areas to an increase of 5 cents a bottle or can, or a total of $1.20 a case at the retail level (App. 157-158).

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 389

FEDERAL TRADE COMMISSION, PETITIONER

v.

ANHEUSER-BUSCH, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Court of Appeals (R. 1515) is reported at 265 F. 2d 677.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1959 (R. 1521). The time for filing a petition for certiorari was extended by order of Mr. Justice Clark, dated July 9, 1959, to September 10, 1959. The petition, filed on September 9, 1959, was granted on November 9, 1959 (R. 1523).

QUESTION PRESENTED

Whether price-cutting in a particular locality by a nationwide seller who maintains higher prices in other

localities, with consequent injury to the seller's competition in the locality in which the lower price is charged, constitutes a discrimination in price forbidden by Section 2(a) of the amended Clayton Act.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

STATEMENT

The Federal Trade Commission issued a complaint in 1955 charging respondent, which sells its beer on a nationwide basis and was the country's leading seller in 1953 and 1954, with discrimination in price, in violation of Section 2(a) of the Clayton Act, by cut-

ting the price of its beer in the St. Louis, Missouri, area while maintaining substantially higher prices in all other areas (R. 3–8). The complaint charged that the large differential between the prices charged respondent's St. Louis customers and the prices charged its customers elsewhere had diverted, and was likely to divert, substantial business to respondent from its competitors in the St. Louis area; and that the effect of this price discrimination might be substantially to lessen competition or tend to create a monopoly in the sale of beer to St. Louis retailers, or to injure, destroy, or prevent competition with respondent (R. 8).

After full evidentiary hearing, the Commission's hearing examiner issued an "Initial Decision" (R. 15–46) holding that respondent had violated Section 2(a) of the Clayton Act, as amended, and ordering it to cease and desist therefrom (R. 46). On appeal, the Commission, in its "Final Order", adopted the examiner's findings and conclusions as its own, and modified his proposed order so as to direct respondents to cease and desist from discriminating in price between different purchasers of its beer "by a price reduction in any market where respondent is in competition with any other seller, unless it proportionally reduces its prices everywhere for the same quantity of beer" (R. 47–48). The Commission also filed an "Opinion" setting forth the grounds for its adoption of the contested aspects of the examiner's decision (R. 49–61).[1] On petition for review, the Court of Ap-

[1] Two of the five Commissioners did not participate in the decision (R. 48, 61).

peals, without passing upon the questions whether respondent's price reductions in St. Louis had the effects upon seller competition which the Commission found to be within the prohibitions of Section 2(a) of the Clayton Act or whether respondent had established an affirmative (meeting-competition-in-good-faith) defense under Section 2(b) of the Act, set aside the Commission's order. It did so upon the sole ground, not raised in the petition to review (R. 64–76), that the price reduction in St. Louis did not constitute a "price discrimination" within the meaning of Section 2(a).

The essential facts and conclusions of law found by the Examiner (R. 15–45) and adopted by the Commission (R. 48) are as follows:

Respondent is one of a small number of so-called "national" brewers whose beer is sold in significant volume in every state, and in nearly every market respondent's beer is sold at a premium price over "regional" beers (those sold in significant volume in a multi-state area but not nationally) and "local" beers (those sold within a small mileage radius from the brewery) (R. 18–21).

Three regional beers compete with respondent in St. Louis (R. 22). In 1953, one of these competitors had 38.9% of this market, one had 29.4% and the third had 14.4%, while respondent ranked fourth with 12.5% (R. 26). Their combined total assets were less than half the total assets of respondent (R. 38).

On October 1, 1953, respondent and the four national Milwaukee brewers increased their prices generally, the amount of the increase varying with the

locality, after having entered into wage-increase contracts (R. 21–22).[2] Many local and regional brewers thereupon also raised their prices but respondent's three St. Louis competitors did not, continuing to sell to retailers in the St. Louis market at the price of $2.35 per case (R. 22).

Prior to respondent's price cuts in 1954, its beer sold in the St. Louis market at a considerably higher price than that of its three St. Louis competitors, $2.93 per case as compared with $2.35 (R. 22–23),[3] and during this period it not only retained but steadily improved its sales volume in, and share of, that market (R. 22–23, 39–40). As of January 1, 1954, two of respondent's competitors sold about 25% of their total output in the St. Louis area, another about 14% and respondent about 3½% (R. 25).

On January 4, 1954, respondent cut its price in the St. Louis market at $2.68 and on June 21, 1954, cut its price further to $2.35. It made no comparable price cuts in any other market (R. 23–24). Respondent's $2.35 price remained in force until March 1, 1955, when it raised its price to $2.80 per case (R. 27). Shortly after this increase, the three competitors raised their per-case price in St. Louis from $2.35 to $2.50 (R. 27).

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[2] Respondent raised its prices in all markets except those in Missouri and Wisconsin (R. 929). Its St. Louis competitors, which sell in various states, made no increases in St. Louis or elsewhere (R. 22, 24, 934).

[3] Respondent's prices in other markets ranged from $3.15 to $3.80 per case (R. 23).

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Respondent made the foregoing price reductions to get business away from its competitors and to punish them for refusing to increase prices when respondent did so in the fall of 1953 (R. 40). During the period of the second price cut, respondent, which had ranked fourth in the St. Louis market in 1953, "jumped into first place by a wide margin" (R. 28). During this period, its percentage of total sales, on a monthly basis, ranged from a low of 33.2% to a high of 39.3% (R. 28-29), as compared with its 12.5% share of this market in 1953 (R. 27-28).[4]

Respondent's price reductions brought its St. Louis prices far below those which it charged elsewhere, diverted substantial business from respondent's competitors in the St. Louis market, substantially lessened competition in this market, and tended to create a monopoly therein (R. 36-37, 56-57). Respondent's price reductions were not made in good faith to meet the equally low prices of competitors (R. 44, 57-59).

The Court of Appeals, in reversing the Commission, noted that respondent sold at the same price, at any given time, to all of its St. Louis customers and that its customers in other areas, who were concurrently

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[4] During this period, one of its competitors, Griesedieck Western, which in 1953 had 38.9% of the St. Louis market, ranged from a monthly low of 21.3% of total sales to a high of 27.0% (R. 26, 30), a loss of approximately one-third of its sales (R. 54). During the same period, another competitor, Griesedieck Bros., which had 14.4% of St. Louis sales in 1953, dropped as low as 4.8% of total sales, and its maximum monthly percentage was 8.8% (R. 26, 30), a loss of almost 41% of its sales (R. 54).

charged higher prices, were not in competition with its St. Louis customers (R. 1518–1519). The court held that in these circumstances the price cuts in St. Louis, even if "directed at" respondent's competitors in that market, did not constitute a price discrimination within the meaning of Section 2(a) of the Clayton Act (R. 1518). The court said that the statute does not prohibit every difference in price, but applies only to price differentials where there is "some relationship between the different purchasers which entitles them to comparable treatment" (R. 1519). In the court's view, the Commission in reality was complaining of "a lowering in price in St. Louis, whether or not discriminatory," and this practice Congress had dealt with, not in Section 2(a) of the Clayton Act, but in Section 3 of the Robinson-Patman Act, 15 U.S.C. 13a, a criminal prohibition which the Commission was given no power to enforce (R. 1520–1521). The court's holding made it unnecessary for it to determine whether the evidence supported the Commission's findings as to the effect on competition of the St. Louis price cuts, or whether the evidence established respondent's affirmative defense, pursuant to Section 2(b) of the Clayton Act, that the price cuts were made in good faith to meet the equally low prices of competitors (R. 1518).

SUMMARY OF ARGUMENT

The court below construed Section 2(a) of the Clayton Act, as amended, to proscribe the charging of different prices to different purchasers only when the purchasers are in competition with one another and hence have a relationship which "entitles them to comparable treatment." Since the price-cutting ac-

tivities of respondent (Anheuser-Busch) were confined to the St. Louis area and since its St. Louis beer purchasers, who were treated alike, were not in competition with respondent's customers in other areas, the statute, under the court's view, was inapplicable. Accordingly, the court set aside the Commission's cease-and-desist order without considering the agency's findings that competition in the seller's line of commerce was injured or respondent's contention that it had established an affirmative defense (meeting competition in good faith) under Section 2(b) of the Act.

The holding that Section 2(a) only reaches differential pricing which is shown to cause injury to competition among buyers cannot, in our view, be squared with the statutory language or history. It is also in conflict with the settled course of judicial interpretation.

A. The Section, by its express terms, relates to price discrimination which may have the effect of substantially lessening competition "in *any* line of commerce" or injuring competition "with any person who either *grants* or knowingly receives the benefit of such discrimination * * *" (emphasis added). These words can be accorded meaning only by a holding that the statute covers differential pricing which causes injury *either* in the primary line of commerce (the seller's) or in the secondary line (the buyers').

B. The reference in the "effects" clause to "any line of commerce" appeared in the original Clayton Act. The accompanying history of that enactment shows that the primary evil which Congress had in mind was injury to seller competition resulting from

geographical price discrimination: destructive local raids against small competitors by large, multi-state manufacturers. Retaining the key language of the Clayton Act, the Robinson-Patman amendments of 1936 made additions which, it was believed, would make Section 2 more effective. It is doubtless true that Congress, in 1936, was largely motivated by disclosures as to advantages being obtained by large (principally chain-store) buyers as compared to smaller purchasers and that it focused upon injury in the so-called secondary line. But there is no suggestion that territorial price discrimination directed against seller competition was not banned. On the contrary, the objective was to expand the protections already afforded by the original Section 2.

C. Holdings in four other circuits (the Second, Fourth, Sixth, and Tenth Circuits) uniformly support the view that Section 2 prohibits a lowering of the seller's price in a particular locality where the effect may be to injure or destroy his local competitors. The decision of this Court in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, points in the same direction. There is no contrary authority.

D. The fact that Section 3 of the Robinson-Patman Act, a criminal provision, partially overlaps Section 2 of the Clayton Act does not deprive the latter statute of its "independent force," *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 380. The civil remedy of a cease-and-desist prohibition is thus available in cases where there is a forbidden price discrimination "common to" both sections. *Ibid.* And see *Safeway Stores* v. *Vance*, 355 U.S. 389.

In spite of the fact that they incurred similar cost increases due to the same wage increases, Falstaff and respondent's other St. Louis competitors chose to absorb the increased costs, as they had a perfect right to do under our competitive system, and did not raise prices in any market (App. 934). Due to the increased spread in price between Budweiser and competitive beers, such as Falstaff, in November 1953 Budweiser sales began to decline drastically. By January 1954, Budweiser sales were down 500,000 cases per month (App. 1145) from the prior year. Falstaff sales, on the other hand, increased in each of the states in which it was in competition with respondent (App. 1384).

In an effort to offset temporarily those losses while experimenting with other means of more permanently doing so, respondent in January 1954 reduced the price of Budweiser to retailers in the St. Louis market by 25 cents a case (App. 979). Even after this reduction the price of Budweiser was still 33 cents higher than the price charged by its competitors in St. Louis. While this price change was in effect respondent's sales in the St. Louis market edged up slightly (App. 1148), but by June 1954 its total sales nevertheless declined by 1,500,000 cases per month as compared with the prior year (App. 1145).

Consequently, from June 21, 1954 to February 28, 1955, respondent further reduced the price of Budweiser in St. Louis. During this period it exactly met the price of Falstaff and others (App. 23). Despite these price reductions, in 1954 respondent's total sales declined 13% from the previous year, while Falstaff's increased by a like percent (App. 1493-94).

During the period of the price reductions in St. Louis, respondent made serious and extended efforts to find a

long range solution to its diminishing sales. Sales solicitation methods, advertising and the sales organization were changed (App. 101, 857-8, 1363-66). On a test basis the 1953 price increase was rolled back in some heavy loss markets, but there was no demonstrable increase in sales in those markets since retailers there were unwilling to reduce prices by 5 cents a bottle upon a mere remission in the wholesale price of 15 cents a case (App. 174-176, 803-804). Intensive study was given to the many problems —legal, tax, production, merchandising, etc.—of introducing new and different size packages for Budweiser which would permit it to be sold at a price competitive with regional beers (App. 175, 626-27, 812-14, 1385-86, 1445). This could not be done in many states because of local regulations (App. 176, 634, 912-14). Respondent decided in the Fall of 1954 to produce and market a new beer designed to appeal to the price-conscious purchasers of lower-priced beer. Simultaneously with the introduction of this new beer on March 1, 1955 in St. Louis respondent increased its price for Budweiser in St. Louis.

Thus, the St. Louis price reductions complained of were only one part of respondent's extensive program to offset its total sales losses, while undertaking to determine the best permanent solution, i.e., changes in packaging of Budweiser and the marketing of new products. The effectiveness of the price reduction part of that program could have significance to respondent only if carried out in St. Louis. It is in the area served by respondent's St. Louis brewery where sales losses to the regional beers were heaviest (App. 1077-1130). Distribution in St. Louis is directly from respondent to the retailer so that there was no question but that its price reductions would immediately take effect in sales to retailers. More important, respond-

ent would not have the problem of freight costs involved in shipping to another market where a regional brewer located there always had a cost advantage. St. Louis is a large market with a good potential existing for additional growth. While respondent was selling at a price above its competitors in St. Louis, its St. Louis competitors accounted for 80% of the market, while respondent was last with between 12% and 13% of the market (App. 1149).

Contrary to the petitioner's statement (Pet. p. 7) that respondent's price reductions adversely affected competition in the St. Louis market, the facts only reveal a temporary shift in business between competitors in that market due to normal competitive activities. Respondent's increase during the first price reduction was a mere 4% of the market (App. 26). Its position during the period of the second price reduction ranged from 33% to 39%, the latter being during February 1955 when there was extensive buying against an announced March 1, 1955 price increase (App. 1497). However, respondent did not attain during the period of the second price reduction a share of the St. Louis market as great as its leading competitors had obtained either before or after the price reduction (App. 1497-98). Whatever position it attained was temporary; by 1956 it had receded to 17.5% of the market, whereas Falstaff at that time had 43% of the market (App. 1498).

It was conceded that in so far as respondent's St. Louis competitors were concerned, their business was "pretty well entrenched over a regional area" (App. 317). It was claimed that there was a loss of sales by these competitors to respondent in St. Louis, but it was also admitted that the permanence of the switching from brand to brand was "not appreciable" (App. 316; see also App. 233, 303).

None of the St. Louis competitors were dependent upon St. Louis sales for their profits since all of them sold in not less than 13 states and had between 75% and 86% of their sales outside St. Louis (App. 25). Moreover, Falstaff, the principal competitor whose price respondent was meeting, was the sixth largest brewer in the nation in 1954 and became fourth largest in 1955 despite respondent's price reductions (App. 1493-96).

Falstaff's net profits before taxes in 1954, despite respondent's price reductions that year, were $6,787,000 (R. 701—Suppl. App. 1). Another competitor's net profits before taxes in the first eight months of 1954 were over $700,000 (R. 802—Suppl. App. 2). There is no indication that the third competitor was in any financial difficulties and its loss of sales in St. Louis during the June price reduction was only 4% of its total sales. Indeed, counsel in effect conceded on trial that "this is not the case of a big dog in a particular locality trying to gobble up one or two small local dogs" (App. 316).

Moreover, it was conceded by Commission counsel during this proceeding that "it is quite clear that the increased sales of Anheuser-Busch in the St. Louis area allowed the respondent to operate profitably within that area" (R. 107—Suppl. App. 3). Further there is an express finding that there was no proof that respondent used income or profit from the rest of its business to stabilize losses in St. Louis or indeed that there were any losses in St. Louis during the period of the price reductions (App. 38).

The petition does not claim that respondent's price reductions were made for the purpose of destroying or eliminating any competitor in St. Louis. Rather it claims that

the reasons were "to get business away from its competitors, and to punish them for refusing to increase prices when [respondent] did so in the fall of 1953" (Pet. p. 4). The first ascribed reason is merely another way of stating that respondent's purpose was to attempt to obtain more business which indeed it was and is certainly not predatory in any sense. The second ascribed reason—the alleged punishment of competitors—is clearly erroneous. The partial quotation from the Initial Decision cited by petitioner (Pet. p. 4) was based upon the assumption of the Examiner that respondent had raised its prices in St. Louis in October 1953 at the same time it raised prices elsewhere in the United States. The Examiner had found, based upon this erroneous assumption, that respondent's reductions were to punish its competitors and teach them a lesson for failure to increase their prices *inside* St. Louis when respondent allegedly increased its prices *inside* St. Louis in the Fall of 1953.*

Respondent pointed out to the Commission on its appeal that the basis of the finding by the Examiner was in error since respondent had not raised its prices in St. Louis and hence there was no "lesson to be taught" to the competi-

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* The Examiner's erroneous version of the facts was that AB raised prices in St. Louis in October 1953, at the same time it raised prices elsewhere in the United States, and that this price increase widened the previous differential in St. Louis to 58 cents. Thus, in the Initial Decision, the Examiner stated:

> "Although AB was not struck, it, too, signed a wage-increase contract, and, as a result, on October 1, 1953 it and its Milwaukee 'national beer' shipping competitors increased prices generally in varying amounts depending upon locality. The three St. Louis brewer competitors of AB—Falstaff Brewing Corporation (hereinafter referred to as Falstaff), Griesedieck Western Brewing Company (hereinafter referred to as G.W.) and Griesedieck Brothers Brewing Company (hereinafter referred to as G.B.) did not follow this raise in prices or make any

tors. Moreover, Commission counsel before the Commission conceded that the Examiner's assumption was in error (Tr. 52, Suppl. App. 4). Accordingly, the Commission opinion did not treat this as one of the contested issues and completely omitted any reference to any alleged "punitive" or "retaliatory" motive. In the Seventh Circuit the Commission changed its position and argued that the purpose of the price reduction, as found by the Examiner and the Commission, was to punish the St. Louis competitors for not raising their prices *outside* St. Louis when respondent did. However, it was demonstrated to the Seventh Circuit that there was no support in either the findings of the Examiner or the Commission's opinion for this unfounded assertion. In the light of this background we submit that it is improper for the petition to claim that one of the purposes of the price reductions was to punish competitors.

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increase in prices, continuing to sell in the St. Louis market (St. Louis and St. Louis County) at \$2.35 per 24, 12-oz. case of bottles, although many other regional and local brewers in other sections of the United States did so." (App. 21-22)

Again, in Paragraph 27, the Examiner stated:

"Secondly, these price reductions were ordered by its president for two admitted reasons: to get business away from its competitors, and to punish them for refusing to increase prices when AB did so in the fall of 1953. Apparently the lesson was well taught and better learned, because those three St. Louis breweries promptly followed AB up with price increases in March, 1955, and were careful to keep the price difference between them and it at less than the 33 cents whose elimination had cost them so much sales volume." (App. 40)

Reasons for Denying the Writ

The reasons assigned by the Solicitor General for granting the writ are not valid when considered in the light of the proposition presented to the Court by the Commission and the admitted facts of this case.

The Commission asked the Seventh Circuit to hold that a lowering of price in one geographical market while maintaining higher prices in other geographical markets was, without the showing of any other circumstance, a price discrimination under Section 2(a). In effec the Commission asked the Court to hold that a seller could not lower his price in one market to get more business in that market without automatically discriminating in price. The effect of such a proposition is to say that Section 2(a) was designed to prevent price competition between competitors, which is the very essence of competition itself. Such a holding would be entirely inconsistent with the free competition which the antitrust laws as a whole are designed to protect. *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 71 (1953); *cf. U.S.* v. *du Pont & Co.*, 353 U.S. 586, 590 (1957).

It did *not* hold, as the petition claims (p. 7), that in a case where a discrimination in price is properly found, that the statutory effects may not be found in competition among competing sellers rather than competing purchasers. Rather, the Court below held only that petitioner has failed to show a discrimination in price under the facts of this case where different prices in different markets is a characteristic of the industry and the Commission did not object to the existence of these differences, where there was no showing that respondent's price reduction resulted in any sacrifice of some part of its necessary costs and profit

and where there was no claim of a predatory purpose such as to eliminate or destroy a competitor.

The decision was that there had to be something more than a mere lowering of the price in one market area to make the difference in price a discrimination in price within the meaning of Section 2(a). It recognized, in quoting Congressman Utterback, that a difference in price among different markets might become discriminatory either because the different purchasers were in competition or because the lower price was so low as to involve a sacrifice of some part of the seller's necessary costs and profit, leaving the deficit to be made up in higher prices to other customers. The Court stated that a mere difference in price becomes discriminatory "generally" where the different purchasers are in competition (Pet. p. 20), but certainly did not exclude by any means the fact that other circumstances might show a discrimination if there were other circumstances in the case. No such circumstances were presented to the court.

Moreover, the decision of the Court below is supported by substantial independent grounds argued to it but not decided by it.

As to all of these grounds, the decision of the Seventh Circuit is clearly in conformity with the language of the statute, its legislative history and the uniform construction of it by Courts of Appeals and this Court. None of the cases cited by petitioner are pertinent to the issue herein.

I

Reasons advanced by petitioner for granting the writ are inapplicable.

The petition asserts that the decision below is contrary to the uniform construction of Section 2(a) by Courts of Appeal and this Court and to the legislative history and therefore, there is presented a question of statutory construction of general public importance. In fact, as we shall show, there is no such conflict and hence no question of statutory construction of general public importance.

(1) There is nothing in the Clayton Act and there is no case which holds that every selective area price reduction in and of itself constitutes a price discrimination. Rather, in all of the cases cited in the petition (Pet. pp. 10-12), the undisputed facts show that the sales by the defendant were made under other circumstances, for example, sales were made below cost or were undertaken with a designedly predatory intent, which have no possible counterpart in this case.

In *Porto-Rican American Tobacco Company* v. *American Tobacco Company*, 30 F. 2d 234 (C.A. 2), cert. den., 279 U.S. 858, the Court noted that "it was also established that at such price the appellant lost on its business, in addition to $20,000 per annum, $10,147 per month" (p. 236), and that there was "sufficient evidence of a design and plan" to put a competitor out of business (p. 237).

In *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, the price of bread was cut in half in one community—and the purpose and result was to force a competitor to close his business. As this Court said, "the destruction of a com

petitor was plainly established, as required by the amended §2(a) of the Clayton Act" (348 U.S. at 118). Actually, the question in the case was one of interstate vs. intrastate commerce. But it is clear that the Court's holding that a violation of Section 2(a) occurred was due to the character and purpose of the lower prices to certain purchasers, not the mere fact that the prices were different or that prices were lower in one community than in another.

In *E. B. Muller & Co. v. Federal Trade Commission*, 142 F. 2d 511 (C.A. 6) the Court of Appeals specifically adverted to a Commission finding that petitioner sold below cost (pp. 516-18), and the evident determination to destroy the sole competitor's business.

In *Maryland Baking Co. v. FTC*, 243 F. 2d 716 (C.A. 4) there was again a demonstrated purpose to eliminate the sole competitor in the area of the price reduction, as the Court noted (p. 718).

The recently decided case of *Atlas Building Products Company v. Diamond Block & Gravel Company*, —— F. 2d —— (10th Cir., Aug. 17, 1959), cited in petitioner's supplemental memorandum, involved in the words of the Court "geographic price discriminations employed for predatory ends" (Supp. Pet. p. 2) and "predatory price cutting which has the effect of eliminating or crippling a competitor" (Supp. Pet. p. 9). The asserted disagreement between the Tenth Circuit in *Atlas* and the Seventh Circuit herein is based upon the Tenth Circuit's theory that the Seventh Circuit held here that in order for a price difference to constitute a price discrimination, the purchasers receiving the different prices must be in competition. However, we did not so contend and the Court did not so hold. Thus there is no conflict between any of the decided cases and this case.

Significantly *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (C.A. 9), cert. den. 350 U.S. 991 is the only adjudicated territorial price discrimination case similar to the instant case where there were no sales below cost or predatory intent. It held that a mere temporary territorial price reduction was not a violation of Section 2(a) of the amended Clayton Act. In *Balian* there was a temporary price reduction in the Los Angeles area while higher prices were maintained elsewhere. Defendant (Arden Farms) normally sold at prices higher than plaintiffs who were purely local competitors (unlike the competing St. Louis brewers here who operate over a substantial part of the country). There were multiple competitors in the Los Angeles area who together dominated the market. Arden, like petitioner, was a large national firm. The competitors remained competitively effective although profits of some of them may have suffered as a result of Arden's price reduction. It was not demonstrated that Arden had sold at a loss during the period of the price reduction and it was found that it did not reduce its prices with any purpose to eliminate a competitor. Rather competition remained vigorous.

There the Court said:

> "It is also broadly stated in the argument that a differential in price in and of itself constitutes discrimination within the meaning of §2(a) of the Clayton Act, as amended.
>
> "But this postulate is universal, arrived at with insufficient bases. 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' There is no presumption set up anywhere that, merely because there is a differential in various areas, necessarily a price discrimination exists." (pp. 367-68)

"The implication of the argments of plaintiffs is that prices can never be lowered by a concern, which does any interstate business, in one area if it fails to make a corresponding cut in every locality where it does business. This postulate need not be debated under the facts here. It may be said Congress did not put a floor under all existing prices so these could never be lowered by a firm doing interstate business." (p. 367)

In short, there is not a single decision of any Court which has held that a price reduction under the circumstances involved herein constitutes a discrimination in price within the meaning of Section 2(a) of the amended Clayton Act. The only case which has been presented with this same problem—*Balian*—has been in complete accord.

(2) The legislative history is in accord that a mere difference in price in separate geographical areas does not without the presence of other circumstances constitute price discrimination within the meaning of Section 2(a) of the Clayton Act. As stated by Congressman Utterback, manager of the Conference Bill that became Section 2(a) of the Robinson-Patman Act:

"*In its meaning as simple English a discrimination is more than a mere difference.* Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other

customers; and there, too, a relationship may exist upon which to base the charge of discrimination. *But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill.*" (80 Cong. Rec. 9416) (Emphasis added.)

Contrary to the statement in the petition (Pet. pp. 9-10), this quotation from Congressman Utterback did not "obviously" relate solely to discriminations productive of injury to competing customers of a seller. Congressman Utterback was not speaking of the line of commerce which might be adversely affected by a discrimination in price, but was speaking only of the meaning of the word "discrimination" as distinguished from the word "difference". The above quotation relied on by the Court says that a mere difference in price is not necessarily a discrimination in price, and went on to discuss when a difference in price becomes a discrimination in price. Congressman Utterback expressly referred to situations "where the goods were sold in different markets", and did not deal with what line of commerce might be affected.

Significantly, there is no legislative history contrary to this statement by Congressman Utterback. Petitioner's reference to other remarks by the Congressman (Pet. p. 10) is completely consistent with his prior statement. In it, he asserts the application of act when "discriminatory prices" are utilized to destroy a sole competitor. However, the quotation does not refer to the question of what constitutes a discriminatory price, which is the issue posed herein. Rather, the remark is directed to another statutory

requirement, namely the necessary effect on competition.

Congressman Utterback was not alone in his remarks. As Congressman Wright Patman, the co-author of the Act, stated in The Robinson-Patman Act (1938) pp. 58-59:

> "Q. Can I sell at different prices to different customers in different cities who are not in competition with each other?
>
> "Opinion: Yes, so long as the sale is not below cost. There would be no discrimination within the application of the Act unless a deliberate attempt were made to destroy or substantially lessen competition in some locality, or in primary lines of commerce."

See also 86 Cong. Rec. 8229 (1936).

The findings of the Examiner and the Commission in this case are squarely within the criteria laid down by Congressmen Utterback and Patman for lawful price differences in different areas.

The Seventh Circuit expressly recognized the significance of these legislative remarks when it stated "there is *generally* no relationship which entitles [noncompeting purchasers] to be charged the same prices." It thus recognized that if, for example, there were demonstrated sales below cost or a demonstrated intent to destroy a competitor, then different prices in different areas might constitute a discrimination in price. No such facts exist here. Instead the Commission expressly recognized, as the Court noted (Pet. p. 17), that in this industry "the prices charged for the same beers varied among different marketing areas". Under these circumstances, the Seventh Circuit properly held that the fact of illegal price discrimination had not been established by the Commission.

Thus, nothing in the legislative history to which the Solicitor General refers (pp. 8-10) detracts in the slightest from the proposition adopted by the Seventh Circuit that the mere lowering of prices in one geographical market without lowering them in other geographical markets, of itself and without more, does not establish a discrimination in price under Section 2(a).

(3) The interpretation the Court placed on Section 2(a) does not present a question of statutory construction of general public importance, when the actual decision is considered in the light of the real question presented.

As pointed out above, there is no conflict in the cases on the question whether or not a mere lowering of price in one market area while maintaining higher prices elsewhere is, without more, a price discrimination under Section 2(a).

And there is no conflict between the petitioner and the Seventh Circuit regarding the difference between Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act. The Seventh Circuit recognized, as the petitioner points out, that there is an overlap between the two sections. The exact extent and scope of the overlap is not important here because the Seventh Circuit held that in any event "we do not find in Section 2(a) the price discrimination proscription sought by the Commission *in this case*."

As stated by Corwin Edwards, a former economic adviser of the Federal Trade Commission:

> "It is difficult to prevent discriminatory price reductions without unduly impairing the entire process of price competition. Reduction of prices is both one of the chief symptoms of competition and one of the foremost objectives of a competitive policy. Any con-

cern that reduces prices probably does so principally in the hope of taking some business away from competitors. Often, however, the competitive incentive is to experiment with price reductions of limited scope rather than with general ones. Conditions of cost, of market demand, and of competitive rivalry which are encountered in the sale of different commodities, or in the sale of the same commodity in different territorial market , are likely to be so various as to invite a policy of price differentiation. The likelihood of price variations becomes all the greater in so far as enterprises adopt a general policy of charging what the traffic will bear; for under such a policy some sales are likely to be highly profitable, while others are made for any price that more than covers direct expenses. Moreover, it may be discreet for an enterprise that is contemplating a general adjustment of prices to experiment with it at certain points before adopting it generally. Local price reductions and price reductions upon particular commodities selected from one's line of products are therefore to be expected, even though the concern instituting them is not cracking the whip over its competitors." (Edwards, Maintaining Competition 162 (1949))

II

Independent grounds not passed upon by the Court below warrant denial of the writ.

Although the Court below did not rule upon these issues presented to it, there was no injury to competition within the meaning of the statute, resulting from any purported discrimination in price, and respondent was meeting a competitor's equally low price in good faith. The presence of these considerations requires that the writ should be de-

nied. A study of the order entered by the Commission highlights the defects in petitioner's reasoning with respect to these points and affords further proof of the correctness of the decision below.

A

There was no injury to competition.

As stated in *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d 356, 368 (C.A. 9) cert. den. 350 U. S. 991:

> "even if discrimination be found, it is not in and of itself denounced, but only when deleterious consequences are probable, i.e., 'where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce' * * *"

In St. Louis at the time of the price reductions, there were four principal brewers of beer, including respondent. Each of them had its home office and main plant there. Prior to the price reductions, respondent's sales in St. Louis ranked a poor fourth among these brewers. Respondent's three principal competitors accounted for a total of 83% of the market.

It is true that during the eight month period of the June price reduction respondent's St. Louis competitors sold less beer in St. Louis than they had in the corresponding period of the prior year.* It is this fact upon which the Commission bases its whole case with respect to injury to competition. However, it is equally true that even if all the sales losses of these competitors could be attributed to

* They sold approximately two-thirds of the beer in the market instead of approximately four-fifths.

respondent's price reductions—and they cannot be—then the maximum loss any one of them suffered as a result thereof, would have been less than 7% of one year's sales. The other two competitors' maximum losses would have been only 4% and 1/10th of 1%. These "losses" were regained in substance when the price reductions, admittedly temporary, were terminated.

As pointed out in the statement above, each of the competitors, and competition, in St. Louis remained keen and vigorous. Competitive activity took many forms, including new products, new sales techniques, new labels, new advertising, etc. Profits of respondent's competitors were sizable and their St. Louis sales increased as soon as respondent's price reductions were terminated.

The sole basis for the Commission's conclusion that respondent's reductions injured competition rests on its finding that competitors temporarily lost some sales to respondent. However, in no previous territorial price discrimination case in which an order or judgment was entered against a defendant has such temporary diversion of sales been the basis for the order. It is the very essence of competition, and in any event, counsel in support of the complaint conceded that the permanence of the switching from brand to brand was not appreciable (App. 316, see also App. 233, 303).

There must be additional factors other than a temporary diversion of sales showing a diminution in the competitive effectiveness of those competitors before the finding of statutory injury to competition may be made. Such additional factors bearing on continued competitive effectiveness were present in all cases where a charge of territorial price discrimination under Section 2(a) of the Robin-

son-Patman Act was sustained. A review of these cas... *Porto-Rican American Tobacco Company* v. *American To-bacco Company*, 30 F. 2d 234 (C.A. 2), cert. den. 279 U.S. 858; *E. B. Muller & Co.* v. *FTC*, 142 F. 2d 511 (C.A. 6); *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115; *Maryland Baking Company* v. *FTC*, 243 F. 2d 716; and *Atlas Building Products Co.* v. *Diamond Block & Gravel Company*, — F. 2d —— (10th Cir. Aug. 17, 1959), reveals each of them contained one or more additional elements, the effect of which was materially to impair the vigor of competition:

1. There was a single competitor in the area of the price reduction whose sales were confined to that area and who therefore was highly vulnerable. Elimination of such competitor in and of itself injured competition.

2. The demonstrated intent of the discriminator was to eliminate or injure the sole competitor in the area.

3. The price was reduced to a point below cost or below the price of the competitors in the area.

4. The discrimination was continued for a period sufficient to seriously impair the competitive effectiveness of the competitor.

Not even one of these factors or any equivalent of them is present in the instant case. Respondent does not contend that all of the factors are the *sine qua non* for a finding of injury to competition. Respondent submits, however, that when, as here, there are multiple competitors in a market, all of whom are firmly entrenched in that area and have been continuously and completely competitive, some such

facts in addition to mere loss of sales are required. Otherwise the Robinson-Patman Act would be the means by which the competition required under the Sherman Act is stifled. Compare *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 74.

B

Respondent met the equally low price of a competitor in good faith within the meaning of the absolute defense of Section 2(b).

This Court held in *Standard Oil Co.* v. *FTC*, 340 U.S. 231, that it is an absolute defense under Section 2(b) to a charge of illegal price discrimination that the alleged discriminator met the equally low price of a competitor in good faith.

In providing for the meeting competition defense the statute draws no distinction between the different types of price discriminations, either territorial or among particular individual customers. It follows that the meeting competition defense is available against any charge of price discrimination under the Act, including alleged territorial price discrimination.

The Commission claimed that when respondent sold its beer at exactly the same price as each of its competitors, it was not meeting an "equally low price" of a competitor (App. 59). How does the Commission avoid the express language of the statute? It just ignores it, as it ignores the express language of the legislative history, which provides that "the proviso permits the seller to meet the price *actually* previously offered by a local competitor." H.R. Rep. No. 2287, 74th Cong., 2nd Sess. 16, cited in *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 248 (1951). (Emphasis added.) Peti-

tioner claims that Budweiser has "superior public acceptance" because it is usually sold at a higher price than other beers. However, Budweiser has had only 6% to 7% of national beer sales which means that 93% to 94% of consumers won't pay a higher price for it. This can hardly be "superior public acceptance". In addition, Falstaff and the other regional competitors in St. Louis had sales several times greater than those of Budweiser and, indeed, when Budweiser and Falstaff were selling at the same price, Falstaff increased its share of the market, as compared with the prior month, in six consecutive months, while Budweiser's share decreased in four months (App. 1497-1498).

The circumstances which underlay respondent's price reductions in St. Louis were that it was drastically losing business outside St. Louis in large measure to the same competitors with whom it was competing in St. Louis. However, due to various factors, including the freight rate problem and others, it was unable to lower its prices outside St. Louis in order to regain sales. Consequently, as a temporary move, prices were lowered in St. Louis in an effort to regain sales and as a stop-gap measure until more permanent steps could be taken to correct the sales problem. For the various reasons outlined above this reduction could take place only in St. Louis.

The Commission claims that this was not an "individual competitive situation" and that the defense should not be available (App. 58). It would require, as it does in its order, that in a territorial case a seller must either systematically match the prices of a competitor in all markets, or else reduce its price where it won't accomplish its purpose

In either instance, the absolute statutory defense would be emasculated.

Petitioner's position is contradicted by the plain terms of the statute, its legislative history, the decisions of this Court, applicable economic principles, general antitrust policy, and the facts of this case. The "meeting competition" defense is available, and is an additional reason for the denial of the writ.

The order of the Commission, prohibiting as it does any reduction in prices anywhere, unless prices everywhere are proportionately reduced simultaneously, is obviously anti-competitive in its application to this industry on the facts found by both the Examiner and the Commission. Indeed, the petition indicates the petitioner's awareness of this fact when it refers to the "possible undue breadth of the Commission's order" (Pet. p. 13). However, since the order is a precise reflection of the Commission's theory of the case, as stated in its opinion (App. 50, 53) and in the Court below (Pet. p. 18), the defects in the order cannot be so glibly divorced from the unsoundness of the whole theory of the case. We submit that the doubts which the petition expresses with respect to "the breadth of the order" in reality represent a reflection upon the soundness of the contention that a mere reduction of price in one area without similar reductions everywhere else constitutes, without more, a prohibited "price discrimination".

Conclusion

The unanimous decision below is consistent with the legislative history and all the decisions of this Court and Courts of Appeals which had passed upon the question. The basis of the petition is the contention that the Court below excluded from the ambit of the amended Clayton Act all instances of territorial price discrimination. It is clear that the language of the Court cannot be so construed. Moreover, the decision of the Court below is strongly supported by other grounds presented to but not passed upon by it. We submit petitioner has made no showing of any special or important reason sufficient to justify this Court in granting a writ.

Respectfully submitted,

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